

(2013) 04 GUJ CK 0035

In the Gujarat High Court

Case No : Special Civil Application No. 15012 of 2005

Hindustan Coca-Cola Beverages Private Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Companies Act, 1956 — Section 391, 394
Customs Act, 1962 — Section 11B, 27A, 75A
Income Tax Act, 1961 — Section 214, 244

Citation : (2013) 04 GUJ CK 0035

Hon'ble Judges : R.R. Tripathi, J;R.D. Kothari, J

Bench : Division Bench

Advocate : Mihir Joshi, assisted by Mr. Tushar P. Hemani, for the Petitioners No. 1, for the Appellant; Y.N. Ravani, Advocate for the Respondent(s) No. 1-2, for the Respondent

Final Decision : Allowed

Judgement

Ravi R. Tripathi, J.—The present petition is filed by Hindustan Coca-Cola Beverages Pvt. Ltd. praying that:-

13. A. Your Lordships be pleased to issue a writ of or in the nature of mandamus quashing and setting aside the order dated 11.4.20-05 passed by the respondent no. 2 at Annexure R hereto and be further pleased to allow the claim of interest of Rs. 2,20,56,050/- (Rupees Two Crore Twenty Lacs Fifty Six Thousand Fifty Only) as per letter dated 18.11.2004, or of such other amount as the Hon"ble Court deems just and proper in the facts and circumstances of the case.

1.1 There was delay in allowing the transfer of respective MODVAT/CENVAT credit from the date of application till the date for grant of such MODVAT/CENVAT credit.

1.2 The Petitioner was aggrieved by order dated 11.04.2005 passed by the Commissioner, whereby the claim of the petitioner, for interest on the ground that there was no provision empowering the department to pay interest on the

MODVAT/CENVAT claim withheld by the Department's inaction, was rejected.

The facts, in brief, giving rise to the present petition are as under:-

1.1. M/s. Britco Foods Company Ltd. merged with the Petitioner Company in terms of a scheme of arrangement u/s 391 and 394 of the Companies Act, 1956 duly sanctioned by the High Court of Delhi. An application was made on 20.02.1998 to the Commissioner for transfer of unutilized MODVAT/CENVAT credit on raw materials to the tune of Rs. 4,26,896/- as well as on capital goods to the tune of Rs. 4,23,96,092/- of M/s. Britco Foods Company Ltd. as on the date of its transfer and merger with the Petitioner Company.

1.2 Despite various reminders and personal representations, no action was taken on the aforesaid application. By a letter dated 27.03.2000, addressed to the Commissioner, the petitioner stated that in view of the sanction of the merger by the High Court of Delhi it would be taking credit in its books of the said unutilized MODVAT/CENVAT credit. In response to that the Commissioner stated that credit could not be taken without proper permission of the Commissioner as per the relevant rules.

1.3 In view of the inordinate delay by the Commissioner in transferring the said unutilized MODVAT/CENVAT credit, the Petitioner preferred a writ petition in which an order was passed on 11.09.2002 directing the Commissioner to decide the pending application, expressing a further hope that while deciding the said application, the claim of the petitioner with regard to the interest would also be decided.

1.4 Thereafter, the Commissioner on 09.10.2002, allowed the transfer of MODVAT/CENVAT credit on raw materials but the transfer of MODVAT/CENVAT credit on capital goods was denied on the ground that M/s. Britco Foods Company Ltd. had purportedly wrongly taken credit of capital goods at the stage of initial setting up of the factory and the claim for payment of interest for delay in grant of transfer of credit was rejected.

1.5 The Petitioner was thereafter constrained to file another writ petition challenging the aforesaid letter in which an order was passed on 15.01.2003, directing the Commissioner to revise/reconsider its order dated 09.10.2002. Pursuant to the said order, the Commissioner on 09.04.2003 passed an order allowing the transfer of credit on capital goods amounting to Rs. 4,23,96,092/- lying in the credit of M/s. Britco Foods Company Ltd. to the petitioner but no order was made was made regarding the claim of interest.

2. The petitioner made a representation reiterating its claim of interest on delay in transferring the MODVAT/CENVAT credit from the date of application dated 20.02.1998 till the order permitting such transfer on 09.10.2002 and 09.04.2003 respectively. The petitioner, in response to the representation, received a show cause notice dated 31.01.2005 from the respondents calling upon the petitioner to state why the claim of interest should not be rejected. The petitioner replied to

the said show cause notice under letter dated 31.03.2005, ""but the case put forward by the petitioner was rejected and the Commissioner passed order in original on 11.04.2005 and declined to pay any interest on the following grounds:-

10. On going through the Central Excise Act and Rules, I find no provision empowering the Department to pay such interest to the assessee. M/s. Hindustan Coca Cola Beverages Pvt. Ltd., have cited two cases of Goldstone Engineering Ltd. Vs. Union of India (UOI), and Hello Minerals Water (P) Ltd. Vs. Union of India (UOI), wherein the Hon''ble High Courts have held that where duty has been wrongly recovered from the assessee, interest has to be paid to him alongwith refund of duty. However, these cases can be distinguished to the present one as no refund of duty is involved here.

2.1 The petitioner therefore, approached this Court by filing the present petition and challenged the order of the Commissioner, who held that no interest is payable to the petitioner.

3. Learned Senior Advocate Mr. Mihir Joshi with learned Advocate Mr. Tushar Hemani for the petitioner submitted that the respondents have restrained the petitioner from transferring to its account and utilizing a definite amount of MODVAT credit from 1998 till 2003 without any valid cause or reason and therefore, the petitioner is entitled to interest for such wrongful deprivation. Learned Senior Advocate for the respondents also submitted that the respondents cannot escape the liability of reasonable interest to the petitioner and are bound to undertake restitution. It was also submitted that even in absence of statutory provision for interest, the petitioner is entitled to interest on principles of compensation for wrongful loss caused to the petitioner on account of the conduct of the department. In support of his submissions, learned Senior Advocate for the petitioner relied on the following decisions:

i. In the case of D.J. Works Vs. Deputy Commissioner of Income Tax, , it was held that even in cases where there was no specific provision for payment of interest on amounts of interest which had been wrongfully retained, the Act itself recognized in principle the liability of the department to pay interest where excess tax was retained and the Court held that the same principle should be extended to cases where interest was retained. The Court held that once interest becomes due, it takes the same colour as excess amounts of tax and they awarded interest thereon at the rates prescribed under the Act.

ii. Reliance was also placed on the decision of the Supreme Court in the case of Sandvik Asia Ltd. Vs. Commissioner of Income Tax-I, Pune and Others, in which it was found that the assessee's money had been unjustifiably withheld by the department for 17 years without any rhyme or reason. The interest was paid only at the instance and the intervention of the Supreme Court. Interest on delayed payment of refund was not paid, to the assessee due to the erroneous view that had been taken by the officials of the revenue. Interest on refund was granted to

the assessee after a substantial lapse of time and, hence, it should be entitled to compensation for the period of delay.

iii. In the case of *Surinder Singh Vs. Union of India (UOI) and Others*, , while dealing with the question whether the petitioner is entitled to any interest for the delayed refund of the excise duty component along with interest, it was found that there is no specific provision regarding payment of interest in the event of delayed refund of a drawback wrongly recovered from an assessed, a reference may however be made to Section 75A read with Section 27A of the Customs Act, 1962 (both introduced from 26.5.1995) where the Parliament appears to have acknowledged the basic principle involved even in the context of drawback. Even otherwise, we are fortified in our conclusion that the petitioner is entitled to interest on the delayed refund by the decisions of the Hon'ble Supreme Court which recognise generally this principle.

iv. In the case of *Commissioner of Central Excise Vs. Rajalakshmi Textile Processors (P) Ltd., S.S.M. Processing Mills Ltd. and Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Under Modvat credit scheme*, duty paid on inputs was allowed to be taken as credit for duty payable on clearance of the final products. The credit taken was nothing but for payment of duty. Thus, Modvat credit is a credit taken on payment of duty which credit could be utilised for the duty payable on the end product. Therefore, the Modvat credit is nothing but the credit available to the assessee on the assessee paying the duty on inputs at the time of clearance of final goods. Hence, credit could be regarded as excise duty available with the assessee for discharging its obligation of payment of duty on final goods. As per Section 11BB, if the refund of duty is not paid within the time stipulated therein, there is a statutory obligation on the part of the Department for payment of interest for the belated refund of the duty. As per the statutory provision, the respondent is entitled for interest for belated refund of the duty credit.

v. Reliance was also placed on the decision of the Gujarat High Court in the case of *Indo-Nippon Chemicals Co. Ltd. and Another Vs. Union of India (UOI) and Others*, , wherein while dealing with the question of applicability of Section 11B of the Act for the purpose of seeking refund of credit availed under the MODVAT Scheme read with the Notifications incorporating Import-Export Policy Q.B.A.L. the Court came to the conclusion that in view of clear language of Clause (c) in the proviso to Sub-section (2), claim for refund based on MODVAT credit is maintainable in accordance with the procedure and limitation prescribed in Sub-section (1) of Section 11B of the Act.

vi. In the case of *Hello Minerals Water (P) Ltd. Vs. Union of India (UOI)*, , it was held that interest is the normal accretion on capital and not a penalty or punishment. Ordinarily, interest should always be awarded whenever any amount is detained or realized by someone, otherwise the person receiving the amount after considerable delay would be losing the entire interest thereon which will be pocketed by the person who managed the delay.

3.1 Learned Senior Advocate for the petitioner submitted that the decision of Sandvik Asia (supra) has been referred to a larger bench in the case of Commissioner of Income Tax, Gujarat Vs. Gujarat Flouro Chemicals, . Learned Senior Advocate for the petitioner submitted that the judgment in the case of Sandvik Asia (supra) is neither reversed nor stayed so far. Learned Senior Advocate for the petitioner submitted that in light of that, the said judgment is a good law. Besides, learned Senior Advocate for the petitioner submitted that reference to larger bench was in context of excess payment of advance tax and interest on refund thereon, particularly with reference to S. 214 of the Income Tax Act, which is not relevant in the facts of the case. Learned Senior Advocate for the petitioner submitted that the interest as set out herein-below for different period is required to be paid at the rate mentioned below for the reason set out i.e. the Notification issued by the Central Excise Department:-

3.2 Learned Senior Advocate for the petitioner submitted that when the Department has acted illegally and ultra virus the Act, an argument that there is no provision for awarding interest under the Act, may not be countenanced. Learned Senior Advocate for the petitioner submitted if the authorities acted as per the law, the question of granting interest on refund can be considered as per the scheme of the Act. Learned Senior Advocate for the petitioner submitted that the refund is always granted as compensation on the ground of equity.

3.3 Learned Senior Advocate for the petitioner submitted that the petitioner is entitled for interest on the amount of interest due to it. Such interest would begin to run from the date of quantification of interest as stated in Annexure F (Page 25 of the petition) till the date of actual payment of interest to the petitioner.

3.4 On the other hand, the learned Advocate for the respondents strongly opposed the petition relying on the decision of Union of India (UOI) and Others Vs. Upper Ganges Sugar and Industries Ltd., . He contended that the Commissioner was right in not granting interest as in the absence of any statutory provision interest could not have been awarded.

4. Having heard learned counsel for the parties and having perused the documents on record, the Court is of the opinion that the respondents are not justified in denying the interest claim of the petitioner. Incidentally, the facts in the present case are not in dispute.

4.1 To reiterate the facts, in February, 1998 an application was filed requesting the Respondent to allow the transfer of unutilized credit in respect of raw material and capital goods to the Petitioner as contemplated under Rule 57F(20) and 57S(5) of the Central Excise Rule, 1994. The said credit was unlawfully withheld by the respondents without any rhyme or reason. Pursuant to the direction of this Court, directing the respondents to decide the application expeditiously, transfer of credit in respect of raw material was allowed on 09.10.2002 but transfer of credit in respect of capital goods was denied on the

ground that such credit was wrongly taken at the stage of initial setting up of the factory and before commencing production. Besides, the request for interest was rejected for want of any statutory provision for payment of interest on amount allowed to be transferred under Rule 57F and 57S of the Central Excise Rules, 1994. Again, it was only after an intervention of this Court, whereby an order was passed directing the Respondent to revise its order in view of the amended provisions of Sub-Rule 2 of Rule 57Q of the Central Excise Rules, 1994 that the request for transfer of credit in respect of capital goods was granted on 09.04.2003 but therein also no order was made as to the claim of interest. It is thereafter that an application was made for grant of interest for [delayed grant of MODVAT/CENVAT credit which was rejected by the respondents for want of a statutory provision enabling the department to pay such interest to the petitioner.

4.2 On an application being made for transfer of unutilized credit to the petitioner on merger, the respondents were duty bound to decide the same within reasonable time by either granting permission to transfer the credit, if it was found that the petitioner had committed no irregularities in any of its claims or ought to have initiated proceedings by issuance of show cause notice calling upon the petitioner as to why such permission to transfer the credit to the petitioner should not be rejected. This would have put the petitioner to notice why such delay was being made and would also, as statutorily required, enable him to oppose any such rejection. Admittedly, this was not done. No show cause notice was issued. No adjudication proceedings were initiated. The petitioner was thus compelled to approach this court by filing various SCAs, praying for appropriate relief. The department initially, even refused to grant the transfer of credit raising some technical objections. It was only at the intervention of this Court that the department, ultimately thought it appropriate to grant the transfer of the amount of unutilized MODVAT/CENVAT credit to the petitioner which the Respondent had unlawfully withheld. While doing so, however, no order was made as to interest. A further application made for grant of interest for delayed payment of MODVAT/CENVAT credit was rejected by the respondents. It is really surprisingly that the logic was that there was no statutory provision enabling the department to pay such interest to the petitioner.

4.3 This Court is of the considered opinion that the entire approach is wholly erroneous. Had the amount been paid as the Central Excise duty or Customs duty or admissible drawback amount, the department would have been willing to consider the claim for interest. But since the amount was withheld wholly without any justification, their stand is that no interest can be paid. The Court finds that on merger, the unutilized credit lying with the amalgamating company gets transferred to the amalgamated company automatically by virtue of Rule 57F(20) and 57S(5) of the Central Excise Rules, 1994. Therefore, it is not a case where the petitioner is to be granted refund by virtue of the order of an appellate authority but it is a case where an amount to which the petitioner was rightfully entitled under the provisions of law was retained without any rationale or reasoning acceptable in law. This Court is thus of the opinion that withholding the

transfer of credit on merger was wholly unauthorized and unjustified because the same was done without any lawful consideration and in clear violation of the legal provisions. Since there was a failure on the part of the department in not initiating any proceedings within time limit, the amount to which the petitioner was rightfully entitled was denied to him. The only inescapable conclusion that we can reach is that the respondents had no reason to deny the transfer of the unutilized credit to the petitioner on merger. They had no authority to withhold such amount in law. In that view of the matter, it would be highly unjust to permit the respondents to hold on to the petitioner's money for nearly 5 years without any interest at all as it would amount to Revenue taking advantage of its own wrong of withholding the permission for transfer of credit.

4.4 The contention to the effect that no interest is payable because there is no provision of interest under the scheme of the Act is also thoroughly misconceived and misplaced. When the Department acts illegally and not as per the scheme of the Act, the interest on such refund can never be provided for under the Scheme of the Act. If the authorities act as per the law, the question of granting interest on refund can be appreciated and considered as per the scheme of the Act.

5. Learned Senior Advocate for the petitioner cited various judgments in support of his contention that even in absence of any statutory provision, interest on refund is automatic and has to be granted on commercial principles. The Court finds force in the contentions of the learned Senior Advocate for the petitioner. The learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Sandvik Asia Ltd. v. Commissioner of income tax, Pune* (supra), wherein the Hon'ble Apex Court even while finding that there was no statutory provision to pay interest on delayed payment of interest, held the assessee entitled to the same on general principles and found that the assessee would be entitled to be compensated by way of interest on interest. It was further pointed out by the learned Senior Advocate for the petitioner that the decision of the Hon'ble Supreme Court in the *Sandvik Asia Ltd. v. Commissioner of income tax, Pune* (supra), has been referred to a larger bench in the case of *Commissioner of Income Tax, Gujarat Vs. Gujarat Flouro Chemicals*, . The said decision is neither stayed nor suspended and therefore, continues to hold the field. Moreover, the said decision is doubted with respect to the issue whether interest is payable by the Revenue to the Assessee if the aggregate of installments of Advance Tax/TDS paid exceeds the assessed tax. Therefore, a doubt is cast only in respect of the finding which is in context with section 214 and section 244 of the Income Tax Act, 1961 and not with regard to grant of interest as compensation to the party who has been wrongfully deprived of the use of its money by an illegal retention of the same by the authority. Therefore, the said decision will continue to hold good in respect of refund cases, on equitable considerations, where any amount is wrongfully withheld from an assessee without authority of law.

6. The learned Advocate for the respondents on the other had relied on the

decision of the Hon''ble Apex Court in the matter of Union of India & Ors vs. M/S. Upper Ganges Sugar & Industries Ltd. (supra) which can be distinguished on facts. It was a case where the issue was regarding interest on rebate of excess production wherein it was held that in absence of any statutory provision, interest could not have been awarded. The question that whether the assessee was entitled to credit or not was also not free from doubt. It was a question which was bona fide agitated and settled by the Tax Tribunal. It was also not a case where the money had been withheld unjustifiably and therefore the claim was denied on equitable consideration as well. The position is quite different in the case on hand, as in this case an amount to which the petitioner was rightfully entitled was illegally and unlawfully withheld and such retention is found to be unsustainable in law. Thus, the said decision relied upon by the learned counsel for the respondents is found not applicable considering the factual matrix of the present case.

7. Under the circumstances, this Court is of the opinion that the order of the Commissioner disentitling the petitioner of any interest on the amount is required to be set aside. The same is accordingly set aside.

8. Learned Advocate for the respondents submitted that the rate of interest is regulated by the different notifications issued by the department from time to time. Accordingly, it is directed that the department will calculate and pay the interest payable for the delayed payment at the rate of 9% per annum within a period of one month from the date of receipt of this judgment and order.

8.1 The department shall also pay 6% simple interest per annum on the interest so quantified as per directions contained in para 9 above. This interest should also be paid within a period of one month from the date of receipt of this judgment and order.

The petition is allowed. Rule is made absolute with no order as to costs.